Filed 12/11/01

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OTHMAR BURGHARD, Plaintiff and Appellant, v. FLUOR DANIEL INC., Defendant and Respondent.	G025875 (Super. Ct. No. 795255) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed in part and reversed in part with directions.

Madoni & Gould and Stephen A. Madoni for Plaintiff and Appellant.

Cooksey, Howard, Martin, & Toolen, Cooksey, Toolen, Gage, Duffy & Woog, Patrick J. Duffy and Joseph M. Parker, for Defendant and Respondent.

Defendant Fluor Daniel, Inc., moved for summary judgment or alternatively, summary adjudication of issues in a wrongful termination action filed by former employee Othmar Burghard. Fluor prevailed and the trial court granted summary judgment. Burghard complains the trial court erred in finding the California Family Rights Act (CFRA) only applies to employees working in California and Burghard had failed to establish a breach of an implied in fact contract for continued employment. Only the second contention has merit.

* * *

Burghard joined Fluor Daniel, Inc., in June 1973, and remained with the company until he was terminated on June 8, 1997. He lived and worked in Texas from December 1988 until August 1994, when he left to begin work as a senior accounting manager on Fluor's "Escondida" project in Antofagosta, Chile. Burghard remained in Chile until the project was completed, on June 8, 1996. He returned to the United States and moved to Irvine, California.

In March 1996, before he left Chile, Burghard applied for a 12-week "family care leave of absence," to begin on the completion of the Escondida project in June. Burghard filed the request with his immediate supervisor in Chile and telephoned another supervisor, Norm Shaw, in California. He needed family leave to care for his father, who was then seriously ill and in need of assistance.

When his family leave time expired in September 1996, Burghard, then living in Irvine, was informed by Fluor no work was currently available for him. On June 8, 1996, Fluor records indicate Burghard was placed on "leave of absence" status, "awaiting assignment."

Burghard's "leave of absence" status was renewed for an additional six months in December 1996. On June 8, 1997, Burghard was terminated because his manager, James Taylor, concluded there was no suitable job assignment available. Taylor had expressed concerns over Burghard's job performance as early as December 1995. He

discussed the matter with Norm Shaw, and they decided Burghard should continue work on the project in Chile until its scheduled completion date. On Burghard's return to the United States, Taylor decided not to rehire him, and he was eventually terminated from the company.

On the first anniversary of his dismissal, Burghard sued Fluor and Taylor for unlawful discrimination in violation of the CFRA, unlawful retaliation in violation of public policy, and breach of an implied contract that he would be terminated only for cause. Fluor attacked Burghard's first amended complaint via a motion for summary judgment, which it prevailed upon. As to the first two causes of action, the court found the CFRA does not apply to employees working outside the state of California, and the undisputed facts showed Burghard was both living and working in Chile at the time he made his family leave request. Similarly, as to the third cause of action, for breach of implied contract, the court found Burghard had "failed to establish any facts" to show "unlawful or improper conduct by the employer which can be directly linked to the decision to terminate." The court concluded Burghard "was terminated for good cause following completion of his assignment on the Escondida project" and dismissed all three causes of action. This appeal followed.

I

The California Legislature enacted the CFRA in 1991. (Gov. Code, § 12945.2.) As part of the Fair Employment and Housing Act (FEHA), the CFRA grants employees the right to take up to 12 weeks of unpaid leave each year for various personal or family medical emergencies, including the need to "care for a parent or a spouse who has a serious health condition." (Gov. Code, § 12945.2, subd. (c)(3)(B).) Any employee entitled to this leave has the right to return to the same or comparable position without loss of job seniority or benefits. (Gov. Code, § 12945.2, subd. (g).) CFRA also has a federal law counterpart — the Family and Medical Leave Act of 1993 (FMLA). (29 U.S.C., §§ 2601-2654.) Federal regulations interpreting the FMLA are incorporated by reference to the

extent they are not inconsistent with the CFLA or other state laws. (Cal. Code Regs., tit. 2, § 7297.10.)

Burghard's first and second causes of action are premised on Government Code section 12945.2. Section 7297.0, subdivision (e) of the California Code of Administrative Regulations is instructive on this point. That section explains the term "'Eligible employee' means a full or part time employee *working in California* with more than 12 months (52 weeks) of service with the employer at any time, and who has actually worked (within the meaning of the Fair Labor Standards Act, 29 CFR Part 785) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave or FMLA leave is to commence." (Cal. Code Regs., tit. 2, § 7297.0, subd. (e), italics added.) Applying this standard, the undisputed evidence shows Burghard did not qualify as an "eligible employee" under the CFRA.[1]

In an effort to raise a triable issue, Burghard submitted a copy of a 1995 e-mail exchange, entitled "EXPAT QUERIES," which described him as an "Irvine office employee on assignment to your country." But this evidence only confirms he was not an employee "working in California." It has no effect on our analysis.

Burghard does not dispute the applicability of the CFRA regulations. Instead, he argues the CFRA applies to him because he was living in California at the time he was *terminated* by the company. We see things a little differently. The CFRA specifically requires that the employee be *working* in California at the time he or she requests leave. (Cal. Code Regs., tit. 2, § 7297.0, subd. (e).) And the uncontroverted evidence shows Burghard was living in Texas at the time he made his request and did not arrive in California

---

[1] Along the same lines, subdivision (d) of the same regulation includes a detailed definition of the term "covered employer," i.e., "any person or individual engaged in any business or enterprise in California *who directly employs 50 or more persons within any State of the United States, the District of Columbia or any Territory or possession of the United States to perform services for a wage or salary*. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full time." (Italics added.). Conspicuous by its absence is any mention of employees working in foreign countries.

until after the requested leave period commenced. No matter how we look at it, Burghard was not a "full or part time employee *working in California*" at the time he filed his leave request. It necessarily follows he was not a "covered employee" within the protection of the statute.

The language of Government Code section 12945.2 also supports our conclusion. Government Code section 12945.2, subdivision (a) makes it unlawful for an employer to refuse a qualified employee's request for family care or medical leave. A grant of leave includes "a guarantee of employment in the same or a comparable position upon the termination of the leave." (*Ibid.*) Defining the phrase "employment in the same or a comparable position," subdivision (c)(4) explains it means "employment in a position that has the same or similar duties and pay *that can be performed at the same or similar geographic location as the position held prior to the leave*." (Gov. Code, § 12945.2, subd. (c)(4), italics added.) Again, the undisputed evidence shows Burghard had no job assignment waiting for him in California after he completed work on the project in Chile. At the time he requested leave, Burghard held a position in Texas, and went on to work on a project in Chile. The City of Irvine is, no doubt, many things to many people, but we would not go so far as to say that it is the "same" or "similar," geographically or otherwise, to either Chile or Texas. Not by a long shot.

A defendant seeking summary judgment bears the initial burden of proving a cause of action has no merit by showing one or more elements of the plaintiff's claim cannot be established or there is a complete defense. (Code Civ. Proc., § 437c, subds. (a), (o)(2).) If this goal is met, the burden then shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. This Burghard cannot do. Only one conclusion can be drawn from the undisputed facts, and that is the CFRA does not apply to this case as a matter of law.

II

Burghard next argues summary judgment was improper because the evidence raised a triable issue as to whether Fluor breached an implied in fact contract for continued employment. Examining the record, we find Burghard carried his burden to produce triable evidence on this issue, and reverse on this cause of action only.

Labor Code section 2922 creates a statutory presumption that employment for an indefinite period is terminable at will. That presumption may be overcome if there is an implied-in-fact contract requiring cause to terminate an employee. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 463.) "Generally, the existence of an implied-in-fact contract requiring good cause for termination is a question for the trier of fact; however, if only one reasonable conclusion can be drawn from the undisputed facts, the issue may be decided as a matter of law on summary judgment. [Citations.]" (*Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1275.)

An implied-in-fact contract may be based on the employer's course of conduct and oral representations. Whether the parties' conduct is sufficient to establish an implied agreement to terminate only for good cause is generally a question of fact. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677.) But the existence of good cause to terminate is a question of law where the facts are not in dispute. (*Moore v. May Dept. Stores Co.* (1990) 222 Cal.App.3d 836, 839-840.)

Ordinarily, we would be required to examine the "totality of the circumstances" to determine whether the parties' conduct, viewed in its proper context, gave rise to an implied in fact contract. For purposes of the summary judgment motion, however, Fluor accepted Burghard's "allegation that an implied contract existed," noting such an agreement "would only serve to limit termination to a case where 'good cause' existed."

So the issue becomes one of "good cause." As Fluor correctly notes, both California and federal courts recognize the termination of an employee following the

completion of a project (known as a "reduction in the workforce") or a reorganization of the company may constitute good cause in the context of a motion for summary judgment. (*Gianculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1395; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1732 [*Martin*].) As *Martin* explains, an employer's "'business decision to reduce its staff with the result that [the employee's] services [are] no longer needed' can be good cause for discharging the employee [citations], and can also support an inference of good faith, and of the absence of an improper motive, in the discharge decision." (*Martin, supra*, 29 Cal.App.4th at p. 1732.)

California law grants employers broad managerial discretion to determine which employees stay or go on the completion of a project. The undisputed evidence shows Burghard completed work on the Escondida project on June 8, 1996. He did not have an assignment waiting for him on his return to the United States. In fact, he remained on "leave of absence – awaiting assignment status" for one year, until June 8, 1997, when he was terminated.

To defeat the motion for summary judgment, Fluor offered evidence, in the form of the deposition of James Taylor and various internal company e-mails, to show Burghard's analytical skills were limited, he had difficulty getting along with others, and he was not assigned to a new project because the company had no "appropriate" assignments available to match his job skills.

In our view, Fluor's showing was sufficient to shift the burden to Burghard to identify a triable issue as to termination for good cause. In response, Burghard offered evidence in the form of his own opinion that he was suited to other jobs within the company and his belief that he was terminated in retaliation for his request for family leave and his decision to retain a lawyer. These subjective beliefs, by themselves, were not sufficient to raise a triable issue as to whether Burghard's termination constituted a breach of an implied contract. It is well settled "an employee's subjective personal judgments of his or her

competence alone do not raise a genuine issue of material fact. [Citation.]" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816.)

There was more, however. During his deposition, Burghard testified he spoke to supervisor Norm Shaw just before he left Chile on June 8, 1996. According to Burghard, Shaw "promised me . . . that any time that I needed to come back after my dad's initial surgeries and when my family leave was over, that he had a job waiting for me." Shaw also "complemented [Burghard] on the excellent job [he] had done and stated to [him] that as soon as your leave of absence is over, all you've got to do is call me and I've got a job for you." A short time later Richard Sotherland, the controller in Fluor's Santiago office, advised Burghard "he wanted me to be on the project immediately due to the fact that he needed help. He . . . wanted me to be his field coordinator for all projects in Chile." Taylor torpedoed both possibilities, going so far as to advise Burghard he would not be hired as "an accounts payable clerk."[2] Another opportunity, working with Jack Rathburn in the former Soviet Republic, met a similar fate. This evidence was sufficient to support the notion that Taylor's opinion of Burghard's skills and abilities was not exactly universal.

Given Burghard's long-term service and history of raises and promotions, we find the alleged promises of continued employment on return from leave were sufficient to give rise to a triable issue as to good faith, i.e., whether Fluor's showing was "untrue or pretextual." (*University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1039.) The order granting summary judgment on this count was improperly granted.

The order granting summary judgment is reversed with directions to deny that motion and enter a new order granting Fluor's motion for summary adjudication on the first and second causes of action only. In all other respects, the judgment is affirmed. Each

---

[2] When Burghard spoke to Shaw in September, he was advised that "'Taylor does not want you back in Chile and the situation is out of my hands. I would like to help you, but again after my conversation with Jim, I cannot help you at this time. Talk to Jim and maybe he will change his mind and he can do something for you.'"

party shall bear it own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.